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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1648

AMERICAN CIVIL LIBERTIES UNION,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The American Civil Liberties Union ("ACLU") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, setting aside as beyond its jurisdiction the Federal Communications Commission's ("Commission's") Report and Order in Docket No. 20508, 59 FCC 2d 294, reconsideration denied, 62 FCC 2d 399 ("1976 Report").

OPINIONS BELOW*

The opinion of the Court of Appeals (App. A) is reported at 571 F.2d 1025 (8th Cir. 1978). The Commission's 1976 Report (App. B) and order denying reconsideration of the 1976 Report (App.C) are reported at 59 FCC 2d 294 and 62 FCC 2d 399.

JURISDICTION

The judgment and opinion of the United States Court of Appeals was entered on February 21, 1978. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the Federal Communications Commission has jurisdiction to issue regulations designed to compel cable television operators

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*/ Petitioner ACLU relies on and incorporates by reference the Petitioner's Appendix in a companion case, Federal Communications Commission v. Midwest Video Corp., No. 77-1575. That Appendix includes each of the opinions required by Supreme Court Rule 23 (1).

to increase technological capacity of cable systems, and to guarantee third-party (public) access to cable channels and facilities.

Whether the Federal Communications Commission's jurisdiction to issue regulations designed to compel cable television operators to increase technological capacity of cable systems and to guarantee third-party access to cable channels and facilities is consistent with the First Amendment when that power is exercised to increase the diversity of information and communication available to viewers.

Whether the Federal Communications Commission's 1976 Report on Cable Television Channel Capacity and Access Channel Requirements, insofar as it retreated irrationally and without justification from the channel capacity and access requirements of the 1972 Report, should be set aside as arbitrary, capricious, and contrary to constitutional right.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law... abridging the freedom of speech, or of the press....

The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 et seq., are set forth in App. E. The relevant rules and regulations of the Federal Communications Commission are 47 CFR § 76.251 (1972 ed.), set forth in App. F, and 47 CFR §§ 76.254 and 76.256 (1977 ed.), set forth in App. B, pp. 169-175.

STATEMENT OF THE CASE

This case proceeded in the Court of Appeals on the basis of two petitions, one by Midwest Video Corporation and one by the American Civil Liberties Union, for review of the Federal Communication Commission's Report and Order in Docket No. 20508 ("1976 Report"), imposing mandatory access and increased channel capacity requirements

upon cable television operators having 3500 or more subscribers.[1/]

Midwest Video Corporation, a cable operator subject to the new regulations, argued that the regulations were beyond the jurisdiction of the Commission and violative of the free speech clause of the First Amendment. Midwest had raised nearly identical arguments against a 1969 Commission requirement that cable operators originate some programing and have available facilities for local production and presentation of programs, arguments rejected by the Court in United States v. Midwest Video Corp., 406 U.S. 649 (1972) ("Midwest Video I").

Petitioner here, the American Civil Liberties Union, sought review of the 1976 Report on the ground that the access regulations lacked a rational basis, but only to the extent that the Commission retreated in the 1976 Report from earlier regulations, issued in 1972, which required all existing systems to supply a public access channel, an education access channel, a local government channel, and a leased access channel,

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1/ App. B.

by March 31, 1977.[2/] The ACLU also argued that the Commission's retreat from the 1972 rules was arbitrary, capricious, contrary to constitutional right, or otherwise not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706 (1970) insofar as the Commission's revised access rules worked against the Commission's longstanding objectives of "increasing the number of outlets for self-expression and augmenting the diversity of programs and types of services available to the public."[3/] However, although it believed that the Commission had not fulfilled its mandate to promote those public objectives, the ACLU joined the Commission in rejecting Midwest's jurisdictional argument, reasoning that the basis for regulation of cable operators "for

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2/ See Cable Television Report and Order 36 FCC 2d 143, 243-44 (1972) ("1972 Report") and App. F. Shortly thereafter, the Commission began granting waivers of the 1972 Report requirements on ad hoc basis, see Notice of Proposed Rulemaking, 53 FCC 2d 782 (1975), usually by granting permission to operate just one "conglomerate" channel for the "dedicated uses". E.g., Stark County Communications, Inc., 38 FCC 2d 1147 (1972).

3/ App. B, pp. 102-103. See also Midwest Video I, supra, 406 U.S. at 667-68.

the purpose of promoting the objectives for which the Commission had been assigned over broadcasting" was conclusively settled by Midwest Video I, supra, 406 U.S. at 667. And without contending that the regulations of the 1976 Report were the only rules that would have passed muster under the First Amendment, or indeed without necessarily supporting each specific provision of the Commission's regulations, the ACLU argued that the First Amendment did not disable the Commission from achieving "long-established, regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." Midwest Video I, supra, 406 U.S. at 667-68.

The Court of Appeals set aside the 1976 Report as beyond the Commission's jurisdiction. The majority[4/] strongly disagreed with the Commission's resolution of the

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4/ Judge Webster concurred in the judgment. App. A, p. 91. The opinion was authored by Judge Markey, of the Court of Customs and Patent Appeals, sitting by designation, and joined by Judge Stephenson.

policy questions at issue.[5/] The court held that the Commission had failed to show a sufficient nexus between the access rules and its regulation of broadcast television. It thereby disregarded this Court's judgment in Midwest Video I that the goals of increased outlets for community self-expression and increased objects of public choice are within the Commission's mandate for the regulation of television, and that the Commission may regulate cable operators as well as broadcasters in furtherance of those goals so long as it has "reasonably determined" that its regulations will further those

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5/ Compare Chief Justice Burger's concurring opinion in Midwest Video I, upholding the Commission's jurisdiction to require cable operators to originate programming:

> [T]he scope of our review is limited and does not permit me to resolve this issue as perhaps I would were I a member of the Federal Communications Commission. That I might take a different position as a member of the Commission gives me no license to do so here. 406 at 676.

goals, 406 U.S. at 667-68.[6/]

The Court made two further rulings on the assumption (which it had rejected) that the 1976 Report was within the Commission's jurisdiction. First, it ruled that, if it had been required to reach the First Amendment question raised by Midwest, it would have held the Commission's access rules constitutionally impermissible on the authority of Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).[7/] And, substituting its

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6/ In his pivotal concurrence in Midwest Video I upholding the Commission's power to require program origination by cable operators to further the goals of diversity and increased choice, Chief Justice Burger observed that "Congress has created its instrumentality to regulate broadcasting, and has given it pervasive powers, and the Commission has generations of experience and "feel" for the problem. I therefore conclude that until Congress acts, the Commission should be allowed wide latitude...." Midwest Video I, supra, 406 U.S. at 676.

7/ App. A, pp. 72-74. The Eighth Circuit apparently did not decide whether the increased channel capacity requirement, alone, would have violated the First Amendment. However, if cable systems are "entitled

(continued on p. 10)

own judgment for the Commission's as to the wisdom or necessity of the rules under review, the Court indicated that even if the Commission did have jurisdiction to promulgate the increased capacity and access rules, the 1976 Report would probably have been overturned as "reflective of agency action arbitrary and capricious."[8/]

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to the same First Amendment rights as other private media, such as newspapers", App. A, p. 72, it would seem that imposition of any requirements by federal or by local authorities would be forbidden. The decision below, if left standing, would apparently bar local imposition of access and capacity regulations and would call into serious question local licensing provisions generally, including the wide-spread practice of granting cable operators exclusive franchises.

8/ App. A, p. 91

REASONS FOR GRANTING THE WRIT

A. The Jurisdictional Question

This Court should decide whether the Commission has jurisdiction to issue regulations designed to increase cable channel capacity and to guarantee part of that capacity for public access in the interests of increased diversity. The Eighth Circuit's resolution of that question is patently in error under the reasoning and holding of previous decisions upholding Commission jurisdiction over cable television operation, United States v. Midwest Video Corp., 406 U.S. 69 (1972), and United States v. Southwestern Cable Co., 392 U.S. 157 (1968). It is also directly contrary to two recent decisions in the Courts of Appeals, American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975), and Brookhaven Cable TV, Inc. v. Kelly, ___F.2d ___, Nos. 77-6156, 77-6157 (2d Cir. March 29, 1978).[9/]

9/ American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975), upheld the
(continued on p. 12)

The Commission has sought, and intervenor National Black Media Coalition ("NBMC") intends to seek, certiorari to review the decision below. The Commission, of course, has a direct and vital interest in the jurisdictional question. Petitioner ACLU is confident that the Commission and the NBMC will fully and ably present to the Court the reasons why the Eighth Circuit's jurisdictional holding should be reviewed. Accordingly, Petitioner relies on those presentations.

1972 Report's access rules against an argument that the Commission was required to go further and treat cable operators as common carriers in the manner provided by Subchapter II of the Communications Act of 1934, 47 U.S.C. §§ 201-222. The Ninth Circuit had no doubts, however, that the Commission had ample jurisdiction to impose either the relatively relaxed 1972 Report access rules, or, indeed, full common carrier status if the Commission saw fit to do so. Id., 523 F.2d at 1350-1351. In Brookhaven Cable TV, Inc. v. Kelly, the Second Circuit held that regulation of special pay cable programming was preempted by the FCC. Brookhaven followed Midwest Video I in upholding FCC jurisdiction over cable TV so long as that regulation furthers "a goal which [the Commission] is entitled to pursue in the broadcast area." Slip. op. at 5.

B. The Constitutional Issues

The ACLU is primarily concerned with that portion of the decision below which held that the First Amendment is an inflexible bar to any imposition by Congress or by the Commission of increased capacity and access requirements. The issue is of overriding national importance: the fundamental structure of television communication for millions of Americans will be determined by its resolution. Only this Court can determine whether the Commission has properly weighed the competing considerations relevant under the First Amendment. 10/

At the heart of this case, should the

10/ The Court has been careful to exercise its responsibility as a national tribunal to decide the critical cases that have structured a national electronic communications system consistent with the First Amendment's prohibition of abridgement of freedom of speech and the First Amendment's protection of editorial diversity, independence, and responsibility. See United States v. Midwest Video, supra (FCC has jurisdiction over cablecasting); Columbia Broadcasting Systems v. Democratic National Committee, 415 U.S. 394 (1974) (broadcaster discretion to reject advertisements); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) (fairness doctrine); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (requirement of licensee independence).

Court reverse on the jurisdictional question, is the problem of where cable television fits into the First Amendment system of freedom of expression. The majority below stated that "care and concern [for First Amendment rights] is remarkably absent from the 1976 Report." App. A, p. 66. To the contrary, although petitioners have urged that the Commission's retreat from the broader 1972 channel capacity and access rules was arbitrary and capricious, petitoners believe that the Commission's general approach to channel capacity and access rules represents a sensitive balance of the following five competing First Amendment interests and principles implicated by the medium of cable television:

1. The interest of a free press in minimizing the dangers of governmental control or governmental editorial intervention. See, e.g., Miami Herald Publishing Co. v. Tornillo, supra; CBS v. DNC, supra.

2. The interest of the public in receiving the widest variety and diveristy of communications. See, e.g., First National Bank of Boston v. Bellotti, 46 U.S.L.W. 4371 (April 26, 1978); Red Lion Broadcasting Co. v.

FCC, 395 U.S. 367 (1969); New York Times v. Sullivan, 376 U.S. 254 (1964).

3. The interest in furthering self-expression. See, e.g., Cohen v. California, 403 U.S. 15 (1971); Whitney v. California, 274 U.S. 357, 375 (1927)(Brandeis, J., concurring).

4. The principle that a person cannot be forced to say what he does not wish to say. See, e.g., Wooley v. Maynard, 430 U.S. 705(1977); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

5. The principle that the government can impose content-neutral time, place, and manner regulations to further important governmental interests not aimed at suppressing speech so long as the flow of information and ideas is not unduly constricted. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949); Cox v. New Hampshire, 312 U.S. 569 (1941).

Without analysis, the Court of Appeals held that cable operators are the exact equivalent, in First Amendment terms, of

newspaper owners, and are thus not subject to regulation, because the factor that has justified regulation of broadcasters - scarce spectrum resources - is assertedly not applicable to cable TV. 11/ But the Court failed to consider whether, based on factors relevant to cable TV, but not to newspaper publishing, the Commission might legitimately have concluded, in its expertise and discretion, that the First Amendment interests and principles set forth do not apply to cable television in precisely the same manner as they apply to newspapers, and that the differences between cable and newspapers justify, under the First Amendment, minimal, non-intrusive regulations designed to increase third-party diversity and choice with-

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11/ Although there is no theoretical limit on the number of cables that can be laid in any locality, there are very substantial practical limits. Cable operators have generally demanded, and received, exclusive franchises from local or state regulatory authorities. Accordingly, even if cable television channels are not "scarce" in precisely the same way as are broadcast frequencies, cable television may still be "scarce" for purposes of First Amendment analysis.

out subjecting cable operators to governmental intervention or pressure. 12/

12/ In a perceptive summary of the competing considerations at issue here, Professor Lawrence Tribe has observed:

> [the] decision to vindicate rights of access with respect to the electronic media but not the print media may be seen as simultaneously realizing two competing constitutional values: "access in a highly concentrated press and minimal governmental intervention." By regulating access in the electronic media exclusively, one achieves significant assurance that information not disseminated by the regulated (electronic) sector will be published by the unregulated (print) sector; and the competition provided by such publication should in turn help to offset any indirect tendency of access regulation to induce narrow or timid coverage within the regulated (electronic) sector....
>
> Since each new medium tends to be widely perceived as "a law unto itself," the danger of escalating from a tolerable to an intolerable level of regulation may be minimized by initially focusing regulatory efforts on new technologies. If it is correct that "[a]ccess regulation in the print media would have immediately signified a pronounced break with traditional first amendment theory," with an attendant transformation in the boundaries of the legally thinkable and a corresponding increase in pressure to regulate still more deeply, then perhaps

Differences in the characteristics of media may justify differences in the First Amendment standards applied to them. Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 386; Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973)(hereinafter "CBS v. DNC".)

As the Commission properly recognized, cable does not share all the characteristics of broadcasting; accordingly, different First Amendment analysis may be warranted. 13/

[Footnote 12/continued]

> the initial selection of the electronic media as the regulated sector illustrates a way of exploiting new technology to permit regulatory experimentation while maintaining vital links with constitutional tradition.

Lawrence Tribe, American Constitutional Law (1978) at 699-700(footnotes omitted).

13/ For example, the Commission has ruled that the fairness doctrine does not apply to cable operators to the extent that they are passive transmitters.

On the other hand, at least three characteristics of cable television, ignored by the majority below, suggest that the First Amendment cannot automatically be applied as if cable were the technological equivalent of newspapers.

First, cable television relies on broadcast signals. 14/ As the decisions in Midwest Video and Southwestern Cable indicate, cable television's operation greatly affects the broadcast media over which the Commission has extensive, constitutionally permissible power. Indeed, the crucial interdependence and interrelationship between broadcasting and cable television was apparently a major factor in the Court's rejection of Midwest's argument that, because of the First Amendment's application to all nonscarce media, the 1969 program origination rules were beyond the Commission's jurisdiction. See generally Midwest Video I, supra,and Brief therein for respondent Midwest Video Corporation.

14/ See Midwest Video I, supra, 406 U.S. at 662, nn. 21-22.

Second, in contrast to newspaper publishers, cable operators are by the very nature of the medium unable to operate freely, at will, without public sufferance, licensing and assistance. Publishers can simply print and distribute; cable operators must enlist governmental authority to gain access to public rights of way, to dig up streets, to lay cable, and to secure the local monopolies, enjoyed by nearly all cable operators, that make cable operation financially possible or attractive. Neither historically, nor practically, can cable operators exist completely independent of government.

To the extent that cable operators function as cablecasters, or "speakers", the First Amendment prohibits governmental abridgement of their free speech rights, and of the correlative right "of the public to receive suitable access to social, esthetic, moral, and other ideas and experiences," Red Lion, supra at 390. But the extensive governmental assistance cable television operation requires is not guaranteed by the First Amendment. Nor does the First Amendment guarantee that such assistance will be provided on demand, and

free of accompanying regulation. 15/ The Court has observed that the government could constitutionally impose access requirements on broadcast frequencies, and the words used by the Court are equally applicable to cable television: "rather than confer [cable operation] monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government surely could have decreed that each [cable system] should be shared by those who wish to use it, each being assigned a portion of the ... day or the ... week." Red Lion, supra, at 390.

15/ "As Mr. Chief Justice (then Judge) Burger has stated in a related context:

> The Petitioners [telephone companies providing CATV channel distribution facilities] have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission."

Midwest Video I, supra, 406 U.S. at 662 n. 21 (citation omitted; emphasis added).

Third, as the Commission 16/ and the Court 17/ have recognized, cable television is technologically a "hybrid," sharing significant characteristics of both broadcasters and common carriers. Indeed, cable television is similar in important respects to electronic broadcast media, to print media, and to common carriers. The Commission's regulations mandating increased capacity to twenty channels and guaranteeing one (1976 Report) or four (1972 Report) channels of that capacity for public access on a first-come first-served basis are founded on the common carrier characteristics and capabilities of cable technology. This suggests a different and more accurate analogy for the purpose of First Amendment analysis--the comparison of cable systems with telephone systems. 18/

16/ Cable Television Report and Order, 36 FCC 2d 143 (1972).

17/ United States v. Southwestern Cable Co., 392 U.S. 157, 172-178 (1968).

18/ The similarities are suggestive, and striking. First, both cable and telephone systems rely on cables laid, or wires strung, from disparate points to a central transmitting or switching facility. Second, with each, although there is no theoretical limit to the number of competing systems in any

The regulation of telephonic and telegraphic cables as common carriers, with responsibility indifferently to carry messages, has never been held to violate the First Amendment. AT&T is free to carry its own messages on telephone lines; but it is also required, in the public interest and consistent with the First Amendment, to carry messages of the public on a first-come, first-served basis.

These factors were overlooked or ignored by the court below. The majority held that cable television is not a public forum, App. A, p. 68, and accordingly ruled that public access was not constitutionally

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[Footnote 18/ continued]

locality, economic constraints dictate monopolistic operation. Third, although the majority of telephone calls are still placed by individual callers to selected, active recipients, the advent of recorded notices and public service messages has made it increasingly clear that the telephone has no more inherent audience discrimination than cable television has. Finally, commercial development of the picturephone and two-way cable television capabilities has rendered the uses and potentialities of cable television and the telephone increasingly indistinguishable.

required. But deciding that cable television is not a public forum does not answer the very different question of whether public access is constitutionally permissable. As the Court has indicated, access may be permissable without being required. Red Lion, supra, 395 at 390.

In CBS v. DNC, for example, the Court did not appear to doubt that the Commission could, consistent with the First Amendment, "devise some kind of limited access that is both practicable and desirable," although it held that political parties had no First Amendment right of enforced access to broadcast time. CBS v. DNC, supra, 412 U.S. at 131. The Court's citation of the Commission's proposed rule on cable access did not suggest any First Amendment bar. Id.

* * *

In CBS v. DNC, the Court warned against freezing the dynamic process of designing "reasonable regulation compatible with the First Amendment rights of the public and the licensees." 19/ That warning is especially

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19/ CBS v. DNC, supra, 412 U.S. at 132.

important here, and argues strongly for the exercise of this Court's authority to review the decision below. The Eighth Circuit has called a sharp halt to the search for a "limited right of access that is both practicable and desirable," held out as a continuing option and opportunity in CBS v. DNC. The decision renders any such right of access violative of the First Amendment.

Although some forms of regulation would involve the Commission and the courts in continuous, intrusive oversight of message content, impermissibly transforming government officials into editors, not all regulations designed to increase diversity and access need necessarily do so, as the court below apparently believed. For example, an increased channel capacity requirement, by itself, although foreclosed by the ruling below, would theoretically raise none of the dangers posed. 20/ Some forms of access,

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20/ The Commission supported and enforced the All Channel Receiver Act of 1962 expressly in order to promote increased diversity and program choice through the growth of Ultra High Frequency television stations.

including the form chosen by the Commission's rules, do not present the danger of "the risk of an enlargement of government control of broadcast discussion of public issues" that has concerned the Court. See, e.g., CBS v. DNC, supra, 412 U.S. at 126. Just as government regulation of telephonic communications on a first-come, first-served basis has not involved the courts or the Commission in a continuing oversight of message content, increased capacity and first-come, first-served public access regulation would carry no danger of discrimination on the basis of subject content, Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972), or identity of speaker, First National Bank v. Bellotti, supra. 21/

21/ The Commission has been required, under the fairness doctrine, to judge broadly whether a licensee's overall performance indicates a sustained good faith effort to meet the public interest in being fully and fairly informed. CBS v. DNC, supra, 412 U.S. at 127. Access on a first-come, first-served basis could be implemented by the Commission's cable rules without even that minimal degree of oversight, which has been thought consistent with the First Amendment. Red Lion, supra.

In the field of electronic communication, where speakers depend on governmental assistance and licensing, the Court has not found the First Amendment a bar to the Commission's consideration of the fact that "the ... public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system ... heavily weighted in favor of the financially affluent or those with access to wealth." CBS v. DNC, supra, 415 U.S. at 94. But ignoring CBS v. DNC, the Eighth Circuit has forbidden the Commission to rely on that "public interest in providing access to the market place" of ideas even where, because of the technological characteristics of cable television, it is possible to give full rein both to the unfettered interests of cable operators, as cablecasters, to program whatever messages they choose, and to the national policy, derived from the First Amendment, of encouraging "'the widest possible dissemination of information from diverse and antagonistic sources.' Associated Press v. United States, 326 U.S. 1, 20, Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367 ...." Midwest Video I, supra, 406 U.S. at 668 n. 27.

CONCLUSION

The Court below held that the increased channel capacity and public access rules were beyond the Commission's jurisdiction and, if within that jurisdiction, violative of cable operators' First Amendment rights.

Although the jurisdictional holding of the Court below is erroneous, and should be reversed, the First Amendment holding particularly requires review. The majority simply assumed that cable operators were the First Amendment equivalent of newspaper publishers, without consideration of the characteristics of cable television that may justify differences in the First Amendment standards applied to it. Examination of those characteristics is necessary to decide whether the First Amendment bars the Commission's imposition of channel capacity and public access rules to achieve long-standing regulatory goals of increasing outlets for community self-expression, and augmenting the public's programming choice.

This case presents the question of where cable television fits into the First Amendment system of freedom of expression. The

Court should grant the writ of certiorari.

Respectfully submitted,

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BRIEF FOR PETITIONER AMERICAN CIVIL LIBERTIES UNION

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THE FEDERAL COMMUNICATIONS COMMISSION MAY REQUIRE A CABLE OPERATOR TO PERMIT PUBLIC ACCESS TO ONE OTHERWISE UNUSED CABLE CHANNEL SINCE: (A) SUCH A REGULATION DOES NOT IMPINGE UPON A SUBSTANTIAL FIRST AMENDMENT INTEREST OF THE CABLE OPERATOR; (B) SUCH A REGULATION SUBSTANTIALLY ADVANCES THE FIRST AMENDMENT INTERESTS OF THIRD PARTIES; AND (C) SUCH A REGULATION APPROPRIATELY APPORTIONS A SCARCE COMMUNICATIONS RESOURCE WHICH IS NECESSARILY THE SUBJECT OF GOVERNMENTAL CONCERN. 20

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Proceedings Below and Jurisdiction

The regulations at issue in this case were adopted by the Federal Communications Commission (FCC) in 1976, after a rulemaking proceeding. Report and Order in Docket No. 20508, 59 F.C.C.2d 294, reconsideration denied, 62 F.C.C.2d 399 (1976). The regulations are set forth at 47 C.F.R. 76-252, et seq. and are reproduced in the Appendix prepared by the FCC as petitioner in 77-1575 at pp. 168-176. The regulations were challenged in two separate proceedings before the United States Court of Appeals for the Eighth Circuit. In Midwest Video Corporation v. Federal Communications Commission, No. 76-1496 (8th Cir.), a cable operator challenged the statutory and constitutional authority of the FCC to issue the regulations. In American Civil Liberties Union v. Federal Communications Commission, No. 76-1839 (8th Cir.), the ACLU challenged the propriety, under principles of administrative law, of the FCC's retreat from 1972 rules which appeared to provide a greater degree of public access to the cable medium.[1] Given the resolution of the statutory

[1] Numerous parties, including National Black Media Coalition, Citizens for Cable Awareness in Pennsylvania, and Philadelphia Community Cable Coalition, all petitioners in 77-1662, intervened as parties before the Eighth Circuit.

and constitutional issues by the Eighth Circuit, scant consideration was given to the contention of the ACLU that the FCC's retreat from the 1972 rules was questionable as a matter of administrative law.[2] Until the statutory and constitutional issues raised by the Eighth Circuit's opinion are clarified, however, petitioner agrees that it is not appropriate to consider its administrative law challenge. Accordingly, petitioner urges this Court to reverse the decision of the Eighth Circuit on the threshold question of the FCC's statutory and constitutional power to promulgate the 1976 regulations and to remand the case for initial consideration of petitioner's administrative law challenge.[3]

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[2] Petitioner contends that the rollback from 1972 to 1976 failed to consider the interests of affected producers of public access programs and failed to recognize the common carrier aspects of cable television. Cf. Teleprompter Corp. v. Columbia Broadcasting Systems, 415 U.S. 394 (1974); Fortnightly v. United Artists Television, 392 U.S. 390 (1968).

[3] Such a procedure would be consistent with this Court's decision in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), upholding the power of the FCC to impose regulations on cable operators while preserving to the Circuits the initial responsibility for passing upon administrative law issues raised by such regulations. E.g., Black Hills Video Corp. v. F.C.C., 399 F.2d 65 (8th Cir. 1968) (upholding the regulations at issue in Southwestern Cable).

The Eighth Circuit's decision, holding that the FCC lacked statutory authority to issue the 1976 regulations and suggesting that it lacked constitutional authority as well, is reported at 571 F.2d 1025 (8th Cir. 1978). The judgment of the Court of Appeals was entered on February 21, 1978. Timely petitions for writs of certiorari were filed by the FCC, the ACLU and the National Black Media Coalition, et al. This Court granted each petition on October 2, 1978 and ordered the cases consolidated for argument. Jurisdiction is invoked under 28 U.S.C. 1254(1).

Statement of the Case

This Court is no stranger to the challenge of integrating technological advances which would have astounded the draftsmen of the Constitution into the constitutional scheme they wrought. Thus, whether it involves the application of Fourth Amendment doctrine to 20th century surveillance technology;[4] the Fifth Amendment to modern tech-

4 E.g., Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967). See generally, United States v. United States District Court, 407 U.S. 297 (1972)

niques of criminology;[5] the Due Process Clause in the context of a society newly made mobile by modern means of transport;[6] or the First Amendment to newly perfected modes of communication, such as motion pictures;[7] radio and broadcast television;[8] a mass press;[9] and cable television,[10] this

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5 E.g., Schmerber v. California, 384 U S. 757 (1966).

6 International Shoe company v. Washington, 326 U.S. 309 (1945).

7 E.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Freedman v. Maryland, 380 U.S. 51 (1965).

8 E.g., National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969); Columbia Broadcasting System v. Democratic National Commitee, 412 U.S. 94 (1973); Federal Communications Commission, v. National Citizens Committee for Broadcasting ___ U.S. ___ (1978); Federal Communications Commission v. Pacifica Foundation, Inc., ___ U.S. ___ (1978).

9 E.g., Associated Press v. United States, 326 U.S. 1 (1945); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

10 E.g., United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Fortnightly v. United Artists Television, 392 U.S. 390 (1968); United States v. Midwest Video Corp., 406 U.S. 649 (1972); Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394 (1974).

Court has sought to defend the basic values embedded in the constitution by seeking to assure that modern technology is applied consistently with those values. Whether the latest product of modern communications technology - cable television - will be utilized to advance - or to retard - basic First Amendment values is what this case is all about.

Cable television began as a device to re-transmit weak television broadcast signals by wire. A weak television broadcast signal was capable of reception by a cable facility and re-transmission in amplified form over a cable network to subscribing homes. In its earliest form, therefore, cable television consisted merely of a passive conduit which served to broaden the availability of existing network broadcast signals.[11] It quickly became clear, however, that once a cable operator had

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11 The essentially passive quality of cable television's re-broadcast aspects has been recognized in the copyright area in cases holding that cable operators are not "performers" within the meaning of the Copyright Act of 1909. Fortnightly v. United Artists Television, 392 U.S. 390 (1968); Teleprompter Corp. v.Columbia Broadcasting System, 415 U.S. 394 (1974). Whether a cable operator who is engaged merely in the passive re-transmission of another's signal may be said to enjoy strong First Amendment interests is discussed, infra, at 22-31.

secured an economic foothold based upon his ability to re-transmit a strong television broadcast signal to paying subscribers, he would be in a position to originate programming which was independent of existing television broadcast signals. Moreover, because the number of simultaneous transmissions over a cable system is limited only by the nature of the cable a cable operator may re-transmit existing broadcast signals and originate his own programming simultaneously. Finally, given the dramatic capacity for simultaneous transmission inherent in the cable process, it rapidly became apparent that community groups seeking access to an inexpensive yet effective method of communication might be accomodated on one or more cable channels without interfering with the simultaneous re-transmission of broadcast signals and the simultaneous origination of independent programming.

As an understanding of the potentialities of the cable process grew, so did a recognition of its limitations. It rapidly became apparent that economic factors created a functional ceiling on the number of cable systems which could operate with reasonable efficiency in a given community. Moreover, wholly apart from economic considerations,

the dislocation inherent in the installation of cable systems under the public streets[12] and the difficulty of assuring secure and efficient maintenance of a cable system running into thousands of private homes,[13] led local authorities to impose stringent controls upon persons seeking to operate cable systems. Under current conditions, entry into the cable field remains subject to restrictive local franchising arrangements which assure existing CATV operators of a monopoly (or, in very few areas of high population density, an oligopoly) over the cable process.

Not surprisingly, FCC regulation of cable television paralleled the evolution of an understanding of its possibilities and limitations. Initial FCC regulation of cable operators centered on their perceived role as passive re-transmitters of existing broadcast signals. Thus, the first set of FCC cable regulations to reach this Court required operators to:

> (a) re-transmit simultaneously the signal of a local television broadcaster who was subjected to enhanced competition because a cable

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12 Cf. Cox v. Louisiana, 379 U.S. 536 (1965).

13 Cf. Hynes v. Borough of Oradell, 425 U.S. 610 (1976).

operator had chosen to re-transmit a distant signal which would not otherwise have been directly competitive with the local broadcaster;

(b) avoid, on request, same day duplication of local television programming; and

(c) refrain from introducing distant signals into the 100 largest television broadcast markets.

In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), this Court upheld the statutory authority of the FCC to promulgate such "reasonably ancillary" regulations.[14]

14 The regulations themselves were upheld on the merits in Black Hills Video Corp. v. F.C.C., 399 F.2d 65 (8th Cir. 1968), cited with approval in United States v. Midwest Video Corp., 406 U.S. 649, 659, n. 17 (1973). It should be noted that one regulation at issue in Southwestern Cable required a cable operator to make a channel available for a local television broadcast signal which was subjected to enhanced competition because of the cable re-transmission of an otherwise non-competitive distant signal. Thus, the Southwestern Cable regulation contemplated pre-empting a channel and forcing a cable operator to carry programming which it might otherwise have omitted. The public access regulation at issue in this case is less onerous in that it operates only to the extent a cable operator has an otherwise unused channel. If the FCC was empowered to compel cable operators to pre-empt a channel in order to re-transmit a given broadcast signal in Southwestern Cable, no obstacle should exist to an FCC rule requiring the transmission of public access programming on an otherwise unused channel. In fairness, it it unclear in both Southwestern Cable and Black Hills Video Corp. whether First Amendment objections to the compulsory transmission rule were advanced.

Paralleling the realization that cable television need not be confined to a passive re-transmission role, the FCC promulgated a second set of regulations designed to assure that cable television developed the necessary technical capacity for the origination or independent programming. The second set of FCC regulations required cable television operators to:

> (a) engage in a significant degree of independent program transmission; and
>
> (b) establish facilities to permit the local origination of independent programming.

In United States v. Midwest Video Corp., 406 U.S. 649 (1972) (Midwest Video I), this Court upheld the power of the FCC to promulgate such program origination regulations.[15]

The third set of FCC regulations (which are the subject of this appeal) deal with the capacity of cable television to serve as a medium of communication for local groups

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15 The regulations upheld in Midwest Video I required a cable operator to pre-empt channels for use in independent program transmissions. Thus, cable operators under Midwest Video I are compelled to carry original programming which they might otherwise have omitted. The public access regulation issue in this case is less onerous since it requires the transmission of public access programming only on otherwise unused channels.

seeking an efficient yet inexpensive mode of communication. The initial FCC approach to public access to cable television was a vigorous one. Cable Television Report and Order, 36 F.C.C.2d 143 (1972). Pursuant to the 1972 order, cable television operators were obliged to dedicate four channels to pre-emptive public uses by March 31, 1977. However, in the years following the 1972 order, demand for public access use did not match 1972 estimates. Accordingly, in 1976, the FCC scaled down its public access regulations to require one (as opposed to four) public access channels. Moreover, the 1976 rules should be read to require a cable operator to provide the single public access channel only to the extent of otherwise unused channel capacity. Report and Order in Docket No. 20508, 59 F.C.C.2d 294, reconsideration denied, 62 F.C.C.2d 399 (1976).[16]

In addition to scaling down the 1972 public access rules, the 1976 rules require cable operators currently transmitting on a 12 channel capacity:

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16 The 1976 rules are set out in the petitioner's (F.C.C.) appendix in 77-1575 and are reported in 47 C.F.R. §76.252 et seq.

(a) to establish a capacity to transmit simultaneously on 20 channels by 1986;[17]

(b) to establish local facilities for program origination; and

(c) to permit local groups to use program origination facilities at reasonable cost.[18]

The Court below ruled that the FCC lacked statutory authority to promulgate any portion of the 1976 (and, presumably, the 1972) rules. Moreover, two members of the Court suggested in dicta that even if statutory authority existed, the 1976 regulations would violate the First (and, perhaps, the Fifth) Amendment.

Finally, the public record reveals that Midwest Video Corporation, the primary challenger of the F.C.C. public access rules, is not itself transmitting on all 12 currently available channels, to say nothing of the 20 channels which will be available to it by

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17 By deferring the 20 channel requirement until 1986, the FCC assured that it would be attained at moderate cost in connection with replacement of existing equipment. Subscribers are not required to install equipment capable of receiving all 20 channels.

18 Local groups using program origination facilities for less than five minutes would not be required to pay any fee.

1986.[19]

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19 According to the public records maintained by Cable Television Bureau of the FCC, Midwest Video's most recent channel utilization status may be summarized as follows:

Physical System No.	Channel Capacity Current	Channel Capacity 1986	Actual Channel Transmission
002596-01 (Bloomfield, Mo.)	12	20	8
002598-01 (Polar Bluff, Mo.)	12	20	7
002594-01 (Greenville, Miss.)	12	20	10
002593-01 (Clovis, N.Mex.)			10
002595-01 (Paris, Tex.)	12	20	10
002592-01 (College Sta., Tex.)	12	20	11 (excluding automated time-weather signal on twelfth channel.)

The Precise Constitutional Issue Presented for Review

The 1976 FCC rules at issue in this case impose three obligations upon operators of cable television systems. First, cable operators serving more than 3,500 subscribers must establish a capacity to transmit simultaneously on 20 channels by 1986 (the "capacity" requirement). Second, cable operators must maintain local facilities for the origination (as opposed to re-transmission) of local programming and must make such facilities available at reasonable cost to local groups wishing to use the facilities to produce programs for the public access channel (the "origination" requirement). Finally, cable operators must, at a minimum, permit public access to one otherwise unused channel on a first come-first served basis (the "public access" requirement).

Two factors complicate a definition of the precise constitutional question before this Court.

First, substantial ambiguity exists as to the precise "public access" obligation imposed on a cable operator by the 1976 regulations. At a minimum, the 1976 regulations require a cable operator to make available one channel not otherwise engaged in program transmission to local community groups on a first

come-first served basis. The regulations are ambiguous, however, as to whether a hypothetical cable operator transmitting broadcast signals on all available channels must pre-empt its regular programming to allow public access programming on one or more channels. In addition, the regulations are ambiguous concerning the obligation of a cable operator confronted with expansive demands for public access which cannot be satisfied by a single channel. Petitioner suggests that neither ambiguity is ripe for resolution on this record.

It is doubtful whether Midwest Video possesses standing to challenge any reading of the FCC regulation requiring it to pre-empt a channel in regular use for use as a public access channel, since the public record indicates that Midwest Video does not currently operate at its current 12 channel capacity (to say nothing of the 20 channel capacity required by 1986). See supra at 12, n. 19. In order for Midwest Video to present a case or controversy challenging a "pre-emptive" public access regulation, it must demonstrate an injury in fact fairly traceable to the challenged regulation. E.g., Eastern Kentucky Welfare Rights Org. v. Simon, 426 U.S. 26 (1976). Since Midwest Video does not utilize its current 12 channel capacity, it can hardly

claim to be injured in a "pre-emptive" sense by a rule requiring it to set aside one otherwise unused channel for public access use.

Similarly, the demand for public access to the Midwest Video system has not been shown to exceed the capacity of a single otherwise unused channel. If and when demand for public access broadcasting becomes so great as to exceed the capacity of a single channel, this Court may be confronted with a case or controversy requiring consideration of whether the 1976 regulations require multi-channel public access and, if so, whether such regulations are valid. However, on the present record, the issue of multi-channel public access is simply not ripe for adjudication.

Since neither the "pre-emptive" nor the "multi-channel" issues potentially posed by the FCC regulations are properly before the Court, the minimum reading of the 1976 regulations, requiring a cable operator to set aside one otherwise unused channel for public access broadcasting, is the only access issue properly before the Court.

The second factor which complicates the precise delineation of the constitutional issue is the insistence of the court below on treating the "capacity," "origination" and "access" aspects of the 1976 rules as a single

package for First Amendment purposes. In fact, the requirement of a 20 channel capacity by 1986 and the obligation to establish local program origination facilities do not raise substantial First Amendment issues. If the FCC is authorized to impose regulations of any kind on cable operators, regulations delineating the minimum technical capabilities of a cable operator, both as to channel capacity and studio equipment, fall at the core of the regulatory power. Origination regulations at least as substantial as the origination regulation at issue in this case were upheld by this Court in United States v. Midwest Video Corp., 406 U.S. 649 (1972), and channel content controls far more onerous than the 20 channel capacity regulation at issue in this case were sustained in United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Indeed, were this Court to take seriously the suggestion of the court below that the 1976 "capacity" and "origination" regulations raise substantial First Amendment issues, the regulations upheld in Midwest Video and Southwestern Cable would be placed in jeopardy, to say nothing of the bulk of the FCC regulations governing broadcast signals and broadcast equipment.[20]

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20 Echoing the jurisprudence of an earlier era, the court below suggested that the expenditure of funds necessary to comply with the

(continued next page)

petitioner suggests, no substantial constitutional question is raised with respect to the "capacity" or "origination" rules. However, the regulation providing for public access to a single otherwise unused cable channel does raise a substantial First Amendment issue which petitioner urges should be resolved in favor of public access to cable television.[21]

"capacity" or "origination" rules might constitute an unlawful taking of property for public use without compensation in violation of the Fifth Amendment. E.g., Smyth v. Ames, 169 U.S. 466 (1898). However, under modern analysis, the expenditure of funds incidental to compliance with a rationally based administrative regulation is not a "taking" of property within the meaning of the Fifth Amendment. Cf. Penn Central Transportation Company v. New York, ___ U.S. ___ (1978); Duke Power Co. v. Carolina Environmental Study Group, Inc., ___ U.S. ___ (1978).

Moreover, by postponing the 20 channel capacity requirement to 1986 in order to allow compliance in the ordinary course of equipment replacement and by providing for reasonable compensation whenever a public access broadcaster uses local origination facilities for more than five minutes, the FCC removed any serious financial sting from the regulations, rendering the Eight Circuit's Fifth Amendment discussion wholly artificial. Certainly, nothing in the record would support a finding that Midwest Video faces serious economic consequences as the result of complying with the "capacity" or "origination" rules.

21 (Please see next page for footnote 21)

21 The issue of the statutory authority of the FCC to impose the 1976 regulations is, of course, a substantial one. Petitioner claims no expertise on the statutory questions and, thus, defers to the FCC and the Department of Justice. However, it would seem that the Rubicon was crossed on the statutory authorization issue when this Court extended the "reasonably ancillary" concept of Southwestern Cable to cover regulations which were not concerned with the competitive impact of cable television on UHF and VHF broadcasters. United States v.Midwest Video Corp., 406 U.S. 649 (1972). It does not appear that the regulations at issue in this case are generically different from the regulations at issue in Midwest Video I.

Moreover, a rationale for FCC regulation of cable television exists entirely apart from an expansive reading of the "reasonable ancillary" concept. The ability of cable television to flourish as a viable economic process rests directly upon its role as a re-transmitter of VHF-UHF broadcast signals. Since it is the conventional broadcast industry which makes possible the continued existence of cable operators and since the existence of cable operators will inevitably exert influence on the broadcast industry, the FCC possesses an interest in regulating the symbiotic relationship which exists between cable operators and conventional broadcasters. Cf. Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394 (1974). Once that symbiotic relationship has resulted in a cable industry capable of independent program origination, the FCC possess an obvious interest in assuring that the capacity for independent program origination, which owes its very existence to conventional broadcast re-transmission, is utilized consistently with the policies which Congress sought to advance in providing for the regulation of conventional broadcasting in the first place.

Accordingly, the sole substantial constitutional question presented here is:

Does the First Amendment bar the Federal Communications Commisson from requiring a cable television operator to make one otherwise unused channel available for public access programming?

ARGUMENT

THE FEDERAL COMMUNICATIONS COMMISSION MAY REQUIRE A CABLE OPERATOR TO PERMIT PUBLIC ACCESS TO ONE OTHERWISE UNUSED CABLE CHANNEL SINCE: (A) SUCH A REGULATION DOES NOT IMPINGE UPON A SUBSTANTIAL FIRST AMENDMENT INTEREST OF THE CABLE OPERATOR; (B) SUCH A REGULATION SUBSTANTIALLY ADVANCES THE FIRST AMENDMENT INTERESTS OF THIRD PARTIES; AND (C) SUCH A REGULATION APPROPRIATELY APPORTIONS A SCARCE COMMUNICATIONS RESOURCE WHICH IS NECESSARILY THE SUBJECT OF GOVERNMENTAL CONCERN.

The Court below reasoned that the invalidation in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), of a Florida statute granting political candidates a right to equal space to reply to newspaper attacks on their qualifications compelled a similar invalidation of the FCC rule providing for public access to one otherwise unused cable television channel. The Court reasoned that governmental attempts to impose even a beneficent degree of control over the content of a cable operator's program transmission violate the First Amendment because they open the door to less palatable forms of governmental intrusion. Such an absolutist approach has the virtue of both simplicity and caution

and has been embraced by at least one member of this Court. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 154 (1973) (Douglas, J. concurring). See also, Yale Broadcasting Co. v. F.C.C., 414 U.S. 914, 916 (1973) (Douglas, J., dissenting from denial of certiorari). See also, Columbia Broadcasting System v. Democratic National Committee, supra, at 132-134 (Stewart, J. concurring). Although the risk of the "slippery slope" is undoubtedly present, a principled stopping point exists which permits the FCC to advance First Amendment values by fostering public access to otherwise unused cable television channels without subjecting those values to an intolerable level of risk. Where, as here, the regulation 1) does not impinge on a substantial First Amendment interest of a cable operator; 2) substantially enhances the First Amendment interests of third parties wishing to originate and to receive public access programming; and 3) involves a mode of communication necessarily requiring a governmental choice as to who may be permitted to engage in it, reasonable access rules strengthen the First Amendment and should be sustained.

A. The First Amendment Interests of Cable Operators, Originators and Viewers of Public Access Programming

Participants in the act of communication generally play one of three roles - speaker, hearer or conduit. Speakers and hearers fit neatly within the "Hyde Park" model of speech. Conduits, however, neither endorse nor receive a given message, but merely provide the technological capacity to increase its audience range. The electronic media, both broadcast and cable, display aspects of both speaker and conduit. Thus, in originating programs and in making editorial judgments about which program to transmit, broadcasters and cable operators perform classic speaker roles in initiating the dissemination of ideas. However, when they provide merely a technological capability for third persons to originate a message, without exercising selective judgment or editorial control, broadcasters and cable operators perform as passive conduits rather than active speakers.[22] Although this

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22 A similar division of functions exists in the print media between the newspaper as speaker and the newspaper as conduit. Compare, Miami Herald Publishing Co. v. Tornillo, 480 U.S. 241 (1973), with Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973).

Court has assiduously guarded the First Amendment interests of speakers and hearers, it has refused to afford substantial First Amendment protection to mere conduits.

Traditional First Amendment analysis has centered on the primacy of the speaker. Viewing the communicative process as the creation of a "marketplace of ideas," this Court has systematically acted to prevent government interference with the freedom of speakers to introduce potentially new ideas into the marketplace. E.g., Near v. Minnesota, 283 U.S. 697 (1931); New York Times v. United States, 403 U.S. 713 (1971). Since the FCC rule at issue in this case merely provides for access to an otherwise unused channel, it in no way impinges upon cable operators in their role as speakers. Moreover, since cable operators remain free to disavow material appearing on a public access channel, the access rule does not even impinge upon a cable operator's interest in refraining from appearing to endorse ideas with which he disagrees. Cf. Wooley v. Maynard, 430 U.S. 705 (1977).[23] Thus, viewed from the perspective of the cable operator as speaker, the FCC access rules do not impinge upon a substantial interest. Moreover, viewed from the perspective of speakers seeking access to cablecasting, the regulations are obviously beneficial.

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23 (See next page for footnote)

In recent years, this Court has identified the hearer as a significant participant in the communicative process and has established protections designed to protect a hearer's access to the marketplace of ideas. E.g., Martin v. City of Struthers, 319 U.S. 141 (1943); Lamont v. Postmaster General, 381 U.S. 301 (1965); Procunier v. Martinez, 416 U.S. 396 (1974); First National Bank of Boston v. Bellotti, ___ U.S. ___ (1978). Indeed, especially in the broadcast area,

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23 To the extent current or future FCC regulations require cable operators to pre-empt existing broadcasting in favor of public access broadcasting, a more serious issue of interference with a cable operator's role as speaker would be presented. Even under such circumstances, the role of cable operators as mere re-transmitters of an existing broadcast signal may cause them to be viewed as conduits rather than speakers. Cf. Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394 (1974). In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), this Court approved an FCC rule which compelled a cable operator to pre-empt one channel for the transmission of a local broadcast signal. However, given the record in this case, this Court need not confront legal issues posed by a pre-emptive regulation since no showing can be made that Midwest Video is utilizing its entire available channel capacity.

hearers rather than speakers appear to be the prime beneficiaries of First Amendment doctrine. Thus, in Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969), this Court noted:

> ...it is the right of the viewers and listeners, not the right of the broadcasters which is paramount.... It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or the F.C.C. Id. at 390.

See also, Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 102 (1973). The FCC regulations at issue in this case act to benefit hearers by assuring that the silence of an otherwise unused channel is replaced by speech. Thus, viewed from the perspective of a hearer, the FCC access rules are wholly positive.

Given the central roles played by speakers and hearers, relatively little attention has been expended on the First Amendment rights and obligations of conduits. Cases which appear to deal with the legal status of conduits often actually turn on the rights of speakers or hearers. Thus, in Miami Herald

Publishing Co. v. Tornillo, 418 U.S. 241 (1974), this Court invalidated a right of reply statute which compelled a newspaper to provide equal space to reply to editorial attacks on a candidate's qualifications. However, as the Tornillo opinion demonstrates, this Court was seriously concerned with the impact which the statute would have on the newspaper's status as an originator of speech. This Court noted in Tornillo that a newspaper's role as speaker was adversely affected by the statute in two ways. First, the space devoted to the reply would, of necessity, pre-empt other material which the newspaper wished to originate. Since the FCC access rules in this case apply only to otherwise unused channels, no possibility exists of similarly pre-empting a cable operator's speech. Second,

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy. 418 U.S. at 257.

Unlike Tornillo, however, the FCC access rules this case would not act to "chill" a cable operator from engaging in controversial programming. Indeed, the existence of a public access channel would

enhance a cable operator's ability to "speak" on controversial subjects since he would not risk pre-emption of regular programming for rebuttal.

Similarly, in Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973), this Court ruled that broadcasters who had decided to refrain entirely from transmitting political advertisements were not constitutionally required to accept paid political advertising. The impact of a contrary ruling in CBS v. DNC would have compelled broadcasters to transmit political advertising in spite of an editorial judgment to avoid the area completely in favor of transmitting alternative material. Such a constitutionally imposed veto of a broadcaster's judgment on program content would have constituted a direct interference with the broadcaster's role as initiator of speech. Moreover, as in Tornillo, mandating political advertising would have pre-empted the broadcaster's first choice of material.[24] Thus, both Tornillo and CBS v. DNC turn on the adverse impact of the regulation in question on the ability of the newspaper-broadcaster to act as a speaker.

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24 This Court expressly left open the question of whether the FCC could compel stations to accept political advertising. 412 U.S. at 119.

Where, as here, a regulation aimed at a conduit does not impinge upon its ability to act as an originator of speech, and does not adversely affect the ability of third parties to act as speakers or hearers, this Court has upheld the regulation against First Amendment challenge. This Court has consistently recognized that, unlike speakers and hearers, mere conduits do not possess independent First Amendment interests of substantial magnitude.

In Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), this Court considered a pure "conduit" case. In Pittsburgh Press, the newspaper challenged a prohibition on employment advertisements carried in sex-designated columns. Since the newspaper itself was not the speaker, but was merely the conduit for a third party; and since the prohibition did not inhibit or preempt material which the newspaper itself wished to disseminate, this Court sustained the prohibition.[25]

Similarly, in Red Lion Broadcasting Co. v. Federal Communications Commission, 395

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25 Whether the regulation would have survived constitutional scrutiny were it directed at the speaker (the putative employer) rather than the newspaper as conduit is more doubtful. Cf. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

U.S. 367 (1969), this Court recognized that once a broadcaster exercises the editorial judgment described in CBS v. DNC and determines to transmit political information, the First Amendment is not violated by - and, indeed, may compel - FCC regulations assuring "balanced" coverage. Since, unlike CBS v. DNC, the "Fairness Doctrine" at issue in Red Lion did not interfere with a broadcaster's editorial judgment as to whether to enter an area at all and since it did not adversely affect the rights of third parties as speakers or hearers, this Court sustained it against First Amendment challenge.

In Red Lion, this Court rejected an argument similar to that advanced in Tornillo, that the existence of an FCC Fairness Doctrine might well deter broadcasters, acting as speakers, from discussing material which could trigger the Fairness Doctrine. Mr. Justice White noted that if the existence of a Fairness Doctrine were found to, in fact, exercise a "chilling effect" on the willingness of broadcasters to discuss controversial areas, he declined to speculate on possible "chilling," leaving the issue for future consideration on an appropriate factual record. Thus, to the extent

that even the Fairness Doctrine threatens to impinge on a broadcaster's speech role rather than his role as a conduit, it would be constitutionally suspect. Since, in Red Lion, the Court viewed the Fairness Doctrine solely as acting on broadcasters as conduits, rather than as speakers, it upheld the doctrine.

Finally, in Associated Press v. United States, 326 U.S. 1 (1945), and Lorain Journal Co. v. United States, 342 U.S. 143 (1951), this Court sustained the application of anti-trust principles to the newspaper industry by reasoning that the anti-trust laws acted on newspapers solely in their role as a conduit. Thus, in Associated Press, the Court stressed that the decree in question exerted no effect upon the newspaper's role as an originator of speech. 326 U.S. at 26, n. 18. Similarly, in Lorain Journal, the predatory advertising policy condemned by the Court in no way impinged upon the role of the newspaper as speaker rather than conduit.

Since the FCC access rules in this case do not adversely affect cable operators as speakers and since the rules benefit cable subscribers as hearers and the public as speakers, they clearly satisfy First Amendment scrutiny. Moreover, when the substantially different interest of a

broadcaster serving as a conduit[26] rather than as a speaker is coupled with the unique characteristics of the cable television medium, the constitutionality of the access rule is clearly established.

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26 A broadcaster performing as a conduit rather than as a speaker is not without some First Amendment protection. Thus, to the extent a regulation aimed at a conduit adversely affects a broadcaster's capacity to function as a speaker, or adversely affects third parties in their attempts to function as speakers or hearers, the regulation is subject to First Amendment review. Compare, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), and Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973), with Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), and Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969). Moreover, even a pure "conduit" regulation may raise extremely difficult First Amendment issues. Thus, a law requiring printers to accept all proferred manuscripts or a regulation requiring printers to set aside presses (in use or idle) for public access printing, would raise serious First Amendment questions. The difficulty in charting the outer reaches of the government's power to regulate speech conduits argues against resting the constitutionality of the FCC access rules solely on the conduit function performed by cable operators. It is enough to note that, as conduits, the First Amendment interests of broadcasters are far less significant than those of speakers and hearers.

B. The Unique Attributes of the Cable Television Medium as a Justification for Public Access Rules

Three modes of verbal communication are currently in general use: face-to-face oral communication, written communication and electronic communication. Although face-to-face oral and most written communications are largely exempt from government regulation,[27] this Court

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27 The most significant government regulation of face-to-face communication involves charting the grey area between constitutionally protected offensive speech and fighting words. Compare, Cohen v. California, 403 U.S. 15 (1971), with Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Written communication, apart from constraints imposed by libel and obscenity law, remains largely free from government regulation.

A fourth mode of communication, relying substantially on non-verbal forms of communication, such as symbolic speech and physical demonstration, is also in widespread use. E.g., Gregory v. City of Chicago, 394 U.S. 111 (1969); Spence v. Washington, 418 U.S. 405 (1974). However, government regulation of such non-verbal modes of communication has tended to stress the impact which the speaker's "conduct" has upon governmental interests unrelated to the suppression of speech. E.g., United States v. O'Brien, 391 U.S. 367 (1968). No such analysis is open to the government in a verbal communications case.

has tolerated a substantial degree of regulation of electronic communication. E.g., National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969); Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.D.C. 1971), aff'd mem. sub nom. Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1973); Federal Communications Commission v. Pacifica Foundation, Inc., ___ U.S. ___ (1978). Two explanations are generally advanced to justify the difference in treatment between essentially unregulated oral and written communication and highly regulated electronic communication.

First, it has been argued that the pervasive impact of the electronic media, which reaches into the home and exerts enormous influence on its targets, justifies a degree of regulation calculated to safeguard the interests of hearers. Thus, in Pacifica, this Court imposed a direct interference on a broadcaster performing as a speaker in order to protect the interests of hearers, and upheld an application of an FCC regulation banning vulgar, but not obscene, words from the airwaves in the afternoon.[28]

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28 (See next page for footnote 28)

Second, it has been argued that the limited broadcast spectrum available to radio and television broadcasters requires a governmental choice among competing applicants as to who will be permitted to exploit the limited resource. Given the necessity for a governmental choice among competing applicants for a lucrative monopoly, the FCC has argued that it may impose reasonable requirements as a condition of its grant of a monopoly to exploit a scarce communications resource.[29]

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28 The Pacifica Court expressly declined to reach the validity of the broad FCC regulation before it, preferring, instead, to decide the case narrowly on its facts. Pacifica is one of the few cases in which the FCC has chosen to interfere with a broadcaster performing as a speaker as opposed to a conduit. The full scope of the FCC's power to require broadcasters to perform as conduits has not been explored. The issue was expressly reserved in Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 93, 119 (1973). However, if Pacifica permits interference with a broadcaster acting as speaker, it is an a fortiori proposition that broadcasters may also be regulated when they perform as conduits, since, as conduits, they advance less substantial First Amendment claims.

29 The "scarcity" rationale was first advanced in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

The Eighth Circuit noted the substantial degree of regulation of broadcasters already approved by this Court, but ruled that cable television operators should be governed by the considerably more stringent First Amendment standards applicable to written and oral speech. The Eighth Circuit was clearly wrong in analogizing cable television to the publication of a newspaper rather than to the broadcast of a television show.

First, to the extent the pervasive effect of broadcasting on its hearers justifies increased government regulation, no principled distinction exists between the "hearers" of a television broadcast or a television cablecast. Candor compels petitioner to concede that "viewer impact" is a weak justification for regulating either broadcasting or cablecasting. It is unclear whether broadcasting exercises a greater or lesser impact on hearers than newspapers. Certainly,

untested assumptions concerning the relative impact of print and broadcasting provide a slender basis for drawing constitutional lines. Moreover, to the extent broadcasting does exercise a greater impact, it is unclear why such an increased impact justifies increased regulation. If broadcasting does possess so great a potential impact, traditional First Amendment doctrine would appear to counsel caution in permitting the government to exercise control over it. It would be a strange view of the First Amendment which forbade the state from regulating print and oral communication because of the potential for governmental abuse, but which permitted regulation of the electronic media precisely because the potential for abuse is far greater.[30] If, however, viewer impact is a valid justification for regulating broadcasters, it would seem equally valid as a justification for regulating cable operators.

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30 Reliance on a "viewer impact" rationale invites unfortunate exercises in regulatory power designed to "protect" hearers from material deemed harmful or offensive by vocal segments of the society. As Pacifica attests, such an approach is fraught with danger.

Second, the critical factor justifying FCC regulation of broadcasters - the necessity for a governmental choice among competing applicants for a monopoly to exploit a scarce communications resource - is present for both broadcasters and cable operators. In the broadcast area the "scarcity" which gives rise to a need for a governmental choice among competing applicants is imposed by the inherent limitation on the availability of frequencies on the broadcast spectrum. Thus, in the broadcast area, technological factors impose a ceiling on the number of possible broadcasters, necessitating a government decision as to who they should be. No such technological ceiling exists in the cablecast area, since, theoretically, an unlimited number of cables may be laid by competing cablecasters. However, unlike print or oral speech, entreé to cable television is governed by a ceiling no less formidable than the technological ceiling which bars unlimited entry to broadcasting. In order to lay a cable, a potential cable operator must often engage in extensive excavation of the public streets. Moreover, in order to connect and to maintain a cable system, cable operators must have virtually continuous access to private homes. The local dislocation inherent in the installation of a cable system and the day-to-day

intrusion into the privacy of homes required to maintain the system, has led virtually every local community confronted with the issue to impose rigid entry restraints upon prospective cable operators. Thus, unlike oral or written speech, government permission is required before a cable operator may seek to engage in installation and transmission.

Moreover, the economic structure of the cable industry is such that only a limited number of cable operators can operate efficiently in a given community, rendering it necessary for localities to license natural monopolies (or natural oligopolies) to insure that the demand for cable service is efficiently and economically satisfied.[31] Of course, technology may evolve to the point where the operation of a cable system does not entail social dislocation traceable to its installation and maintenance. Moreover, technological advances may render it economically feasible to expand the number of poten-

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31 Whether economic factors alone could justify the imposition of regulations on the broadcast industry was expressly reserved by the Court in Red Lion, 395 U.S. at 401, n. 28. This Court need not reach the issue in this case either, since the ceiling on the number of possible cable operators does not flow exclusively from ecomomic factors.

tial cable systems capable of operating in a given community. At the point when cable systems may be established and maintained without social dislocation and may be operated as something other than natural monopolies, the current justification for government regulation may cease to exist. However, under current conditions, a cable television franchise is fully as scarce a communications resource as a place on the broadcast spectrum.

Unlike broadcasting and cable operation, however, entry into oral or written speech is not subject to a ceiling on the number of potential speakers. No technological factors limit the number of speakers or writers. No social dislocation comparable to excavating the public streets flows from the establishment of a newspaper or the delivery of a public speech. No economic factors operate to render print or oral communication the province of a limited number of entities.[32] Accordingly, society

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32 Recent developments in the newspaper industry point toward the growth of an oligopolistic pattern of operation. This Court has upheld regulations designed to sever ownership of newspapers and broadcast outlets in an effort to spur competition in the communications industry. E.g., Federal Commission Communications v. National Citizens Committee for Broadcasting, ___ U.S. ___ (1978); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). However, the economic factors which combine to render cable television a natural monopoly are not present in the print media where competition, though shrinking, remains pervasive.

makes no attempt - nor could it - to limit the maximum number of oral speakers and writers and, thus, is never called upon to exercise a choice between competing applicants for limited positions. Since society does not grant any benefit to a speaker or writer, it may impose no burden. Conversely, however, the grant of a benefit to broadcasters and cable operators justifies, if it does not compel, the minimal burdens at issue in this case.

CONCLUSION

Since the FCC access rule in no way interferes with a cable operator's role as an originator of speech; since the FCC access rule exerts a strongly beneficial impact upon the First Amendment interests of third parties as speakers and hearers; and since the access rule is imposed as a quid pro quo for a grant of a natural monopoly to exploit a scarce communications resource, the rule is constitutionally permissible. Accordingly, the decision of the Eighth Circuit on the question of the FCC's power to issue the 1976 regulations should be reversed and the case remanded for consideration of the remaining issues presented by the record.[33]

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33 (Please see next page for footnote)

33 As petitioner has suggested, the record on this appeal does not require this Court to address the issues of multi-channel or pre-emptive public access to cable television.

Moreover, a decision upholding a narrow reading of the FCC access rules will not end the controversy over demands for greater public access to cable television. To the extent that the reasonably foreseeable demand for public access broadcasting exceeds the capacity of a single channel, the question of whether the FCC may - or must - require multi-channel public access will, no doubt, arise. Moreover, to the extent a cable operator desires to utilize all 20 channels in its "regular" programming, the question of whether the FCC may - or must - direct a cable operator to pre-empt regular programming in favor of public access programming will, no doubt, arise. In deciding the "pre-emptive" public access issue, this Court will be required to decide whether a cable operator engaged in the re-transmission of a broadcast signal should be treated as a speaker or a conduit for the purposes of First Amendment analysis. Finally, this Court will be asked to decide whether, in serving the interest of hearers and originators of public access programming, the FCC may - or must - impinge on the speaker status (if any) of cable operators and render them involuntary conduits. Although such issues are not free from doubt, petitioner believes that the substantial First Amendment interests served by increased public access to cable television justify, and perhaps compel, FCC regulations designed to treat cable operators as common carriers over a portion of their 20 channel capacity.

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